

Fair Political Practices Commission
Memorandum

To: Chairman Getman, Commissioners Downey, Knox, and Swanson

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Pre-notice Discussion of Amendment to the Rulemaking Process -- Regulation 18312.

Date: December 3, 2002

I. INTRODUCTION

At the October 2002 Commission meeting, the Commission considered the proposed regulation calendar for 2003. In the same memorandum, Commission staff proposed that in light of the current financial situation, the number of meetings that are used in connection with the adoption of regulations be reduced by the Commission. Customarily, the Commission staff holds “interested persons” meetings, in addition to pre-notice and adoption hearings on most regulations. As noted in October, all of these steps are labor intensive. Thus, staff recommended that the Commission forego the regular interested persons meetings and the pre-notice discussion stage for CY2003 and instead, grant staff the flexibility of determining which special circumstances warrant additional public meetings. This process can be implemented without amending regulation 18312. This is because the current language of regulation 18312 makes the holding of a pre-notice hearing discretionary with the Commission. The current regulation does not mention “interested persons” meetings which are also discretionary. However, if the Commission wishes to amend the regulation to clarify and streamline the process, we have included draft language for Commission consideration.

II. HISTORY

On March 6, 1991, a superior court determined that the Commission was not subject to any provision of the Administrative Procedure Act (the “APA”) that was not in effect at the time the voters adopted the “Act,” June 4, 1974. The court interpreted section 83112 of the Act to be a specific reference to the provisions of the APA as they existed in former Government Code, Title 2, Division 3, Part 1, Chapter 4.5, Sections 11371, et seq. (copies attached) at the time the Act was adopted.

The court also found that the Commission exceeded its statutory authority by adopting then-existing regulation 18312, because the regulation required the Commission to comply with later enacted provisions of the APA. Consequently, the court invalidated then-existing regulation 18312 as inconsistent with section 83112.

In support of this conclusion, the court observed that the voters, in adopting the Act in 1974, created an independent agency with broad powers to bring ethical reform to the political process. The provisions of the Act were not intended to be subject to constant modification by amendment to referenced statutes, such as the APA. Moreover, the court concluded that it was not intended by the voters that the Commission's regulatory power be controlled by another state agency headed by a partisan appointee.

There are several significant differences between the APA as it existed on June 4, 1974, and the current obligations imposed by the APA on other state agencies. Some of these differences are as follows:

- Under the 1974 APA, regulations were required to be consistent with the statute which the regulation interpreted or implemented. This same requirement exists under the current APA. However, under the 1974 APA, there was no provision permitting another administrative agency (OAL) to evaluate consistency and approve or disapprove a regulation based on this analysis. Thus, the issue of consistency, under the 1974 APA, was an issue for the courts to determine.
- In addition, the 1974 APA did not require the submission of any specific documents by the Commission, other than the express language of the regulation (or an informative summary) and a statement of authority.
- Under the 1974 APA, a notice of Commission action on a regulation must be provided 30 days prior to the action. Under the current APA, a 45 day notice-period is required.
- The 1974 APA requires that notice be provided in more ways and to more entities (such as publication of the notice in a trade publication and filing of the notice with the Rules Committee of each house of the Legislature) than currently required under the APA.
- The documents required in a notice of Commission action on a regulation under the 1974 APA are fewer. For example, under the 1974 APA, the notice must contain a statement of the time, place and nature of proceedings; a reference to the authority under which the regulation is proposed and a reference to particular code sections or other provisions of law which are being implemented. In addition, the Commission may include the express terms of the regulation or an informational summary of the proposed action.

Thus, current regulation 18312 is a codification of these 1974 statutory provisions.

III. DISCUSSION OF PROPOSED AMENDMENTS

Existing subdivision (a) of the regulation provides definitions. When initially drafted after the *FPPC v. OAL* decision, these definitions were intended to act as links between the terminology used in the June 4, 1974 APA and the terminology of the current APA. For example, since 1974, the California Notice Register had been renamed. Consequently, it was necessary to define the term to include the "California Administrative Register" and any successor publication of the

Office of Administrative Hearings. (Regulation 18312(a)(2).) These provisions continue to serve these same purposes. The proposal today would not modify the definitions.

Subdivision (b) sets out the Commission procedure for adopting, amending and repealing regulations pursuant to the June 4, 1974 APA. The provisions also provide a general description of internal Commission policy and procedures pertaining to regulatory action, such as pre-notice hearings which are a mechanism of the Commission's creation. In addition, the regulation discusses the method currently used in the case of regulations that are continued to later dates. The proposed draft has three significant amendments to this section.

Decision 1 presents the policy issue of whether the Commission wishes to continue utilizing an "interested persons" meeting as a part of the rulemaking process. The current rule does not prohibit such meetings, but does not specifically mandate them as well - it is simply silent. If the Commission wishes to continue using interested persons meetings, it may be useful (although not absolutely necessary) to add a reference to these meetings in the regulation. If the Commission decides to abolish interested persons meetings and pre-notice hearings, addition of the language at decision point one is unnecessary.

Decision 1 staff recommendation: To the extent the interested person description is added to the text of the regulation, we would recommend it be discretionary.

Decision 2 presents the issue of whether pre-notice discussion should be eliminated or whether Commission staff may determine when pre-notice discussion is to be held.

Decision 2 includes two options. Current subdivision (b)(2) describes the pre-notice hearing process used by the Commission. The pre-notice hearing, as currently described in the regulation, is permissive. If the Commission determines to abolish pre-notice hearings, (b)(2) will simply be deleted as shown in **Option B**.

However, if the section is retained, we would request that the regulation be modified expressly to grant staff discretion as to whether to schedule a pre-notice hearing or whether to go directly to adoption. This amendment will have practical effect only in limited circumstances. As you are aware, the staff currently presents an annual regulatory calendar for Commission adoption and quarterly updates of the calendar. In each instance the proposed hearings for any pending regulation will be presented to the Commission in advance for the Commission's approval or rejection. It will only be in those instances when items arise between these quarterly updates that staff may need to schedule the regulation without a pre-notice hearing before the Commission can be consulted.

In those rare instances, staff will be able to decide whether a pre-notice hearing should be scheduled. Even in those cases, pursuant to proposed subdivision (b)(6), the Commission, when considering the item at a Commission meeting, can always direct staff to hold additional interested persons meetings, pre-notice hearings, or adoption hearings on any given item. Proposed subdivision (b)(6) is discussed below at **Decision 4**.

Decision 2 staff recommendation: If the Commission chooses to retain pre-notice discussion, staff recommends the language in *Option A*.

Decision 3 would amend subdivision (b)(4). Proposed subdivision (b)(4) deals with the familiar problem of late filed written comments. On occasion, written comments have been submitted so late (i.e., close to or even after the start of the meeting) that the Commission was not able to consider these before the vote. This proposed provision would simply put into regulatory form a reasonable limitation as to how late written comments may be filed. The section would not impact oral comments at the hearing.

There is one *subdecision* in this section, **Subdecision 3A** allows the Commission to either set a deadline that falls at noon on the preceding business day, or at 5:00 the preceding business day. Obviously, the deadline selected should be the one that the Commission believes gives both staff adequate time to circulate the letter and the Commission adequate time to review and consider it in connection with the Commission meeting.

Decision 3 staff recommendation: Staff recommends inclusion of the proposed language in subdivision (b)(4) and recommends 5:00 p.m., the close of business the preceding business day.

Decision 4 would add new subdivision (b)(6). This subdivision again reflects the current rule that at any meeting the Commission may direct staff to hold additional interested persons meetings, pre-notice hearings, or adoption hearings on any given item. Of course, should the Commission choose to abolish interested person or pre-notice hearings, this provision would have to be modified accordingly.

Decision 4 staff recommendation: Staff recommends the inclusion of subdivision (b)(6).

The final decision point, **Decision 5**, would present a new alternate process, similar to that proposed to the Commission in 1999. (See excerpt from *Staff Memorandum "Pre-notice Discussion on Deadlines for Submitting Documents to the Commission"* attached at **Appendix 2**.) Since this process would be very different from the current process, staff recommends that the Commission designate a limited number of items to follow this procedure at the beginning of the year, or at one of the quarterly update meetings.

There are two subdecisions in this section, **Subdecision 5A** would also authorize Commission staff to implement the process. **Subdecision 5B** provides that the process would be required or permissive.

The main anticipated advantage from using the streamlined process is that comments (written and oral) will be obtained well in advance of the actual adoption of the regulation. This will allow staff time to fully consider all comments and present the comments with responses to the Commission at the time of adoption. As a safeguard, the streamlined procedure also provides that where the Commission decides to adopt something different than that noticed during the comment period, an additional comment period (15 days) is required.

Decision 5 staff recommendation: If the Commission amends the regulation to add the streamlined process, staff recommends inclusion of language authorizing the staff to invoke the process. Staff also recommends that the streamlined process be permissive, so that it would not be so difficult to implement the new process on any large scale.

Overall, however, staff believes that changes made as discussed above are sufficient to maximize expedited review of Commission regulations. By adding language under **Decision 3** that written materials will not be considered by the Commission if submitted late, late submission will be discouraged.

Attachments

Appendix 1 – Proposed Regulation 18312

Appendix 2 – Excerpt from September 27, 1999 Staff Memorandum